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Michael Parenti: Right-Wing Judicial Activism

Roundup: Media's Take

[Michael Parenti's recent books include Superpatriotism (City Lights), The Assassination of Julius Caesar (New Press), and The Culture Struggle (Seven Stories Press), all available in paperback; also visit: www.michaelparenti.org.]

> Appearing before the Senate Judiciary Committee as nominee for Chief Justice of the Supreme Court, John Roberts assured the senators that he would not be one of those noisome activist judges who inject their personal values into court decisions.
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> He would behave like “an umpire calling balls and strikes.” With a completely open mind, he would judge each case solely on its own merits, with only the Constitution to guide him, he said.
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> None of the senators doubled over with laughter.
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> A fortnight later, while George Bush was introducing another Court

nominee---his right-wing Jesus-freak crony Harriet Miers---he prattled on about his "judicial philosophy" and how he wanted jurists to be "strict constructionists" who cleave close to the Constitution, as opposed to loose constructionist liberals who use the Court to advance their ideological agenda.

It is time to inject some reality into this issue. In fact, through most of its history the Supreme Court has engaged in the wildest conservative judicial activism in defense of privileged groups.

Be it for slavery or segregation, child labor or the sixteen hour workday, state sedition laws or assaults on the First Amendment---rightist judicial activists have shown an infernal agility in stretching and bending the Constitution to serve every inequity and iniquity.

Right to the eve of the Civil War, for instance, the Supreme Court asserted the primacy of property rights in slaves, rejecting all slave petitions for freedom. In the famous Dred Scott v. Sandford (1857), the Court concluded that, be they slave or free, Blacks were a "subordinate and inferior class of beings" without constitutional rights.

Thus did reactionary judicial activists---some of them slaveholders---spin racist precepts out of thin air to lend a constitutional gloss to their beloved slavocracy.

When the federal government wanted to establish national banks, or give away half the country to speculators, or subsidize industries, or set up commissions that fixed prices and interest rates for large manufacturers and banks, or imprison dissenters who denounced war and capitalism, or use the U.S. Army to shoot workers and break strikes, or have Marines kill people in Central America---the Supreme Court's conservative activists twisted the Constitution in every conceivable way to justify these acts. So much for "strict construction."

But when the federal or state governments sought to limit workday hours, set minimum wage or occupational safety standards, ensure the safety of consumer products, or guarantee the right of collective bargaining, then the Court ruled that ours was a limited form of government that could not tamper with property rights and could not deprive owner and worker of "freedom of contract."

The Fourteenth Amendment, adopted in 1868 ostensibly to establish full citizenship for African Americans, says that no state can "deprive any person of life, liberty, or property, without due process of law," nor deny any person "equal protection of the laws."

In another act of pure judicial invention, a conservative dominated Court decided that "person" really meant "corporation"; therefore the Fourteenth Amendment protected business conglomerates from regulation by the states.

To this day, corporations have legal standing as "persons" thanks to conservative judicial activism.

By 1920, pro-business federal courts had struck down roughly three hundred labor laws passed by state legislatures to ease inhumane working conditions.

Between 1880 and 1931 the courts issued more than 1,800 injunctions to suppress labor strikes. No trace of conservative restraint during those many years.

When Congress outlawed child labor or passed other social reforms, conservative jurists declared such laws to be violations of the Tenth Amendment. The Tenth Amendment says that powers not delegated to the federal government are reserved to the states or the people. So Congress could not act.

But, when states passed social welfare legislation, the Court's right-

wing activists said such laws violated "substantive due process" (a totally fabricated oxymoron) under the Fourteenth Amendment. So the state legislatures could not act.

Thus for more than fifty years, the justices used the Tenth Amendment to stop federal reforms initiated under the Fourteenth Amendment, and the Fourteenth to stymie state reforms initiated under the Tenth. It's hard to get more brazenly activist than that.

A conservative Supreme Court produced Plessy v. Ferguson (1896), another inventive reading of the Fourteenth Amendment's equal protection clause. Plessy confected the "separate but equal" doctrine, claiming that the forced separation of Blacks from Whites did not impute inferiority as long as facilities were equal (which they rarely were). For some seventy years, this judicial fabrication buttressed racial segregation.

Convinced that they too were persons, women began to argue that the "due process" clauses of the Fourteenth Amendment (applying to state governments) and the Fifth Amendment (applying to the federal government) disallowed the voting prohibitions imposed on women by state and federal authorities.

But in Minor v. Happersett (1875), the conservative Court fashioned another devilishly contorted interpretation: true, women were citizens but citizenship did not necessarily confer a citizen's right to suffrage. In other words, "due process," and "equal protection" applied to such "persons" as business corporations but not to women or people of African descent.

At times, presidents place themselves and their associates above accountability by claiming that the separation of powers gives them an inherent right of "executive privilege." Executive privilege has been used by the White House to withhold information on undeclared wars, illegal campaign funds, Supreme Court nominations, burglaries (Watergate), insider trading (by Bush and

Cheney), and White House collusion with corporate lobbyists.

But the concept of executive privilege (i.e. unaccountable executive secrecy) exists nowhere in the Constitution or any law. Yet the wild-eyed right-wing activists on the Supreme Court trumpet executive privilege, deciding out of thin air that a "presumptive privilege" for withholding information belongs to the president.

Bush just recently talked about "how important it is for us to guard executive privilege in order for there to be crisp decision making in the White House." Crisp? So Bush presents himself as a "strict constructionist" while making claim to a wholly extra-constitutional juridical fiction known as "executive privilege."

With staggering audacity, the Court's rightist judicial activists have decided that states cannot prohibit corporations from spending unlimited amounts on public referenda or other elections because such campaign expenditures are a form of "speech" and the Constitution guarantees freedom of speech to such "persons" as corporations.

In a dissenting opinion, the liberal Justice Stevens noted, "Money is property; it is not speech." But his conservative colleagues preferred the more fanciful activist interpretation.

They further ruled that "free speech" enables rich candidates to spend as much as they want on their own campaigns, and rich individuals to expend unlimited sums in any election contest. Thus poor and rich can both freely compete, one in a whisper, the other in a roar.

Right-wing judicial activism reached a frenzy point in George W. Bush v. Al Gore. In a 5-to-4 decision, the conservatives overruled the Florida Supreme Court's order for a recount in the 2000 presidential election. The justices argued with breathtaking contrivance that since different Florida counties might use

different modes of tabulating ballots, a hand recount would violate the equal protection clause of the Fourteenth Amendment.

By preventing a recount, the Supreme Court gave the presidency to Bush.

In recent years these same conservative justices have held that the Fourteenth Amendment's equal protection clause could not be used to stop violence against women, or provide a more equitable mode of property taxes, or a more equitable distribution of funds between rich and poor school districts.

But, in Bush v. Gore they ruled that the equal protection clause could be used to stop a perfectly legal ballot recount. Then they explicitly declared that the Bush case could not be considered a precedent for other equal protection issues. In other words, the Fourteenth Amendment applied only when the conservative judicial activists wanted it to, as when stealing an election.

We hear conservatives say that judges should not try to "legislate from the bench," the way liberal jurists supposedly do. But a recent study by Paul Gewirtz and Chad Golder of Yale University reveals that conservative justices like Thomas and Scalia have a far higher rate of invalidating or reinterpreting Congressional laws than more liberal justices like Byers and Ginsberg.

By this measure, too, the conservatives are the more activist.

In sum, the right-wing aggrandizers in black robes are neither strict constructionists nor balanced adjudicators. They are unrestrained power hustlers masquerading as sober defenders of lawful procedure and constitutional intent.

If this is democracy, who needs oligarchy?

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